**FILED**
**U.S. Bankruptcy Appellate Panel of the Tenth Circuit**

**June 30, 2003**

**Barbara A. Schermerhorn Clerk**

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL**

**OF THE TENTH CIRCUIT**

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| IN RE ELEVA, INC., doing business as T.E.N. (Total Entrepreneur Network),<br><br>Debtor. | BAP No. UT-02-051 |
| KENNETH A. RUSHTON, Trustee,<br><br>Plaintiff – Appellant,<br><br>v.<br><br>STAR DIAMONDS, INC., doing business as ARI Diamonds,<br><br>Defendant – Appellee. | Bankr. No. 97C-22299<br>Adv. No. 01PC-2032<br>Chapter 11<br><br>ORDER AND JUDGMENT* |

Appeal from the United States Bankruptcy Court
for the District of Utah

Before McFEELEY, Chief Judge, BOHANON, and MICHAEL, Bankruptcy Judges.

BOHANON, Bankruptcy Judge.

The Appellant-Trustee appeals an Order that denied his motion for summary judgment, granted Appellee's motion for summary judgment, and dismissed the complaint. For reasons explained below, the Court AFFIRMS the decision of the bankruptcy court.[1]

**Standard of Review**

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

[1] The Court also GRANTS the motion to file a supplement to the Appellee's brief, construed from the filing of the supplement to the brief on September 9, 2002.

"For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable de novo), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion')." Pierce v. Underwood, 487 U.S. 552, 558 (1988). Although neither party identifies the appropriate standard of review in its brief, the applicable standard is de novo because this appeal hinges on whether the bankruptcy court correctly applied the substantive law. See Kaul v. Stephan, 83 F.3d 1208, 1212 (10th Cir. 1996) (holding that de novo was the appropriate standard of review on an appeal of a motion for summary judgment and that appellate court was to apply the same legal standard used by the bankruptcy court).

## Background

The facts in this case are largely undisputed. Two adversary proceedings are involved here. In the first adversary proceeding, the Appellant, the Trustee for the Debtor's estate, brought a complaint against a third party, Joe Goot, seeking avoidance under 11 U.S.C. § 547 of a preferential transfer of 394 pairs of diamond earrings. After a trial, the bankruptcy court entered judgment in favor of the Trustee ("the Goot Judgment"). That judgment required Goot to either return the earrings to the Trustee or pay the Trustee $102,440, the value of the earrings.

Several months passed and Goot did not return the earrings or pay the money. Consequently, the Trustee obtained a Writ of Execution for the United States Marshal to seize and sell the earrings. The Trustee's Praecipe specified that the Marshal was to attach the earrings. The Marshal seized the earrings and sold them at an auction for substantially less than the amount owed on the Goot Judgment. As a result, approximately $96,000 of the Goot Judgment remains unsatisfied.

The Trustee then commenced this complaint to recover the deficiency on the Goot Judgment from the Appellee, alleging that Goot was acting as the Appellee's agent when

he received the diamonds.[2] Thus, the Trustee sought to hold the Appellee liable as a transferee.

Both parties moved for summary judgment; however, the bankruptcy court denied the Trustee's motion, granted the Appellee's motion, and dismissed the complaint.

**Discussion**

Section 550 governs who may be liable for avoidable transfers. The statute provides:

> (a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from -
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> (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or
>
> (2) any immediate or mediate transferee of such initial transferee.

11 U.S.C. §550(a). It further provides that "(d) The trustee is entitled to only a single satisfaction under subsection (a) of this section." 11 U.S.C. § 550(d).

In this case, the bankruptcy court granted the Appellee's motion for summary judgment concluding that the Trustee had already recovered the value of the transferred property.

The Trustee argues that the bankruptcy court erred in concluding that the execution on the earrings constituted a return of the earrings. Instead, he contends, without supporting legal authority, that the execution was merely a means of collecting on a money judgment. According to the Trustee, the Goot judgment granted alternative relief: either Goot return the earrings or the Trustee have a money judgment for their value. In other words, it is the Trustee's position that return of the earrings could only be accomplished by their actual delivery.

The Court disagrees. A review of the findings of fact and conclusions of law

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[2] Goot's wife, Panna Goot, is the sole owner of the Appellee.

made at the hearing on the cross-motions for summary judgment clarifies that the bankruptcy court analyzed § 550(a) properly. That section allows a trustee to recover the property transferred or its value. Moreover, the Goot Judgment granted the Trustee relief either through return of the earrings or through a money judgment.

It is well-established that a bankruptcy court has broad discretion in deciding whether to award return of the property or its value. Morris v. Kansas Drywall Supply Co., Inc. (In re Classic Drywall, Inc.), 127 B.R. 874, 876-77 (D. Kan. 1991) (discussing various methods used by bankruptcy courts to decide whether to award return of the property or its value). Most courts hold that these alternatives are mutually exclusive. That is, § 550(a) permits the bankruptcy court to order either the return of the transferred property or the payment of its value. See 5 Collier on Bankruptcy ¶ 550.05 at 550-28 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2002) ("Subsection (d) recognizes the possibility that more than one entity may be liable, but that the trustee's remedy is limited to the recovery of the property or its value, and not damages."). But see Feltman v. Warmus (In re American Way Service Corp.), 229 B.R. 496, 531-32 (Bankr. S.D. Fla. 1999) (looking to the definition of "or" in § 102 to show the alternative grounds for relief in § 550(a) are not mutually exclusive and discussing circumstances under which it would be appropriate to award return of the property and its value, such as depreciation, so as to restore the estate to where it would be but for the transfer).

A trustee is limited to a single satisfaction under § 550(d). For example, assume the trustee holds a money judgment for $100 and both A and B are liable as transferees. If A pays the trustee $100, then the trustee cannot recover any amount from transferee B. The trustee has obtained a complete satisfaction. Accord Belford v. Cantavero (In re Bassett), 221 B.R. 49, 55 (Bankr. D. Conn. 1998) (holding that recovery from one defendant was not allowed where another defendant had satisfied trustee's claim); Meeks v. Greenville Casino Partners, L.P. (In re Armstrong), 217 B.R. 569, 579

(Bankr. E.D. Ark. 1998) (noting "the total collection may not exceed the maximum amount of these avoidable transfers"); Campbell v. Small Bus. Admin. (In re Jameson's Foods, Inc.), 35 B.R. 433, 440 (Bankr. D. S.C. 1983) (holding that although the defendants were jointly and severally liable, the trustee's remedy was limited to a single satisfaction).

The instant case presents similar circumstances to those in the above example. The Goot Judgment awarded the Trustee either the earrings or a money judgment. Even though Goot did not voluntarily return the earrings, the Trustee was placed in the same position by the execution as if Goot had returned the earrings voluntarily. The Trustee now complains there is a deficiency due to the low sales price. However, the Trustee's alternative was to protect his interest in the earrings by making a credit bid for them. As the successful bidder, he then would have been free to sell the earrings as he saw fit. This alternative would have placed him in the same position he would have been in if the diamonds had been delivered to him in the first place. Indeed, the record shows that the Trustee's Praecipe directed the Marshal to seize specific property, namely the earrings. The Trustee did not seek a general levy on whatever property the Marshal could find.

## Conclusion

Accordingly, the Court affirms the bankruptcy court's decision to deny the Trustee's motion for summary judgment, grant the Appellee's motion for summary judgment, and dismiss the complaint.[3]

[3] The Court need not address the other issues raised on appeal because it is convinced the bankruptcy court's decision was proper.